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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943
No. 823

AMERICAN-WEST AFRICAN LINE, INC. and
BARBER STEAMSHIP LINES, INC.,
Petitioners
(Claimant and Respondents-Appellants below),

against

"HUILEVER" S. A. DIVISION HUILERIES
DU CONGO BELGE, and others,
Respondents
(Libelants-Appellees below).

(Consolidated Causes)

BRIEF OF LIBELANTS-RESPONDENTS J. H. ROSSBACH & BROS. IMPORT CORPORATION AND G. LEVOR & CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

AMERICAN-WEST AFRICAN LINE, INC. and BARBER STEAMSHIP LINES, INC., Petitioners (Claimant and Respondents-Appellants below), against "HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, and others, Respondents (Libelants-Appellees below). (Consolidated Causes)	October Term 1943 No. 823

BRIEF OF LIBELANTS-RESPONDENTS J. H. ROSSBACH & BROS. IMPORT CORPORATION AND G. LEVOR & CO., INC.

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The opinion of the District Court (R. 1189-1203) is reported at 49 F. Supp. 945.

The opinion of the Circuit Court of Appeals (R. 1269-1273) is reported at 139 F. 2d 748.

Both courts below held the petitioners and the *Otho* liable for damage to cargo caused by a fracture of the shell plating in the No. 1 hold of the steamer.

Five libels in admiralty were brought in rem against the vessel and in personam against her owner and operator, two of them by the owners of cargo stowed exclusively in No. 1 hold into which seawater was admitted by the fractured plate and three by the owners of cargo stowed partly elsewhere.

This brief is filed on behalf of J. H. Rossbach & Bros. Import Corporation and G. Levor & Co., Inc., the owners of cargo stowed in No. 1 hold.

The five suits were tried together before Honorable George Murray Hulbert, D. J. in the United States District Court for the Southern District of New York, who held the ship and the petitioners liable in an opinion handed down on January 26, 1943 (R. 1189-1203). Five interlocutory decrees were entered in favor of the respective libelants (R. 1224-1234), and thereafter, on May 14, 1943, an order of consolidation was entered for the purpose of appeal to the Circuit Court of Appeals for the Second Circuit without prejudice to the entry of separate decrees on mandate in the District Court upon the disposition of the appeal (R. 1235-1236). Following the disposition of the appeal the consolidation of these causes was extended by order entered March 7, 1944 to include any proceedings in the Supreme Court of the United States for a review of the decree of the Circuit Court of Appeals (R. 1277).

The petitioners' appeal, allowed under date of May 19, 1943 (R. 1237-1238), from the interlocutory decrees to the Circuit Court of Appeals for the Second Circuit was argued November 8, 1943, before Swan, A. N. Hand and Chase, C. JJ. On January 5, 1944, the Circuit Court of

Appeals handed down an opinion by Swan, C. J., affirming the decrees below (R. 1269-1273).

The Circuit Court of Appeals made and filed on March 14, 1944, a single order of affirmance (R. 1276), in accordance with its opinion, which is the order of which the petitioners now seek review.

The opinion of the Circuit Court of Appeals states that the main issue presented by the appeal was the correctness of the District Court's findings of fact that:

1. The H-3 starboard plate was cracked and leaked seawater into No. 1 hold before the *Otho* encountered the severe storm of January 11, 1941.

2. The *Otho* was unseaworthy with respect to this plate when she sailed on her voyage.

3. Her owners had failed to exercise due diligence to make her seaworthy.

4. The crack in the hull plating resulted from such lack of diligence rather than from the perils of the sea (R. 1270).

5. The vessel's unseaworthiness in respect of the fractured shell plating resulting from want of due diligence caused the damage to the cargo stowed elsewhere than in No. 1 hold as well as that stowed in No. 1 hold (R. 1273).

The court below stated and reviewed in considerable detail the evidence on which the findings are based and held that they were sufficiently supported by the evidence and that "the findings of fact which the appellants challenge are not so clearly erroneous that an appellate court would be justified in setting them aside" (R. 1272).

Questions Presented

It is believed that, although the petition states 15 questions presented, pages 8-10, specifies 16 errors to be urged, pages 11-12, and gives 12 reasons for granting the writ, pages 13-15, the writ is sought upon the theory that the following questions are presented:

1. Whether the treatment by the Circuit Court of Appeals of findings of fact presents a question on which there is a conflict among the circuits.

2. Whether both lower courts were in error in finding that the crack in the shell plating developed before the storm was encountered, in failing to hold that the defect in the plate was a latent one not discoverable by due diligence, and in holding that the evidence established a causal relation between the unseaworthy plate and the damage to the cargo stowed elsewhere than in No. 1 hold.

3. Whether the Carriage of Goods by Sea Act in effect overrules the decision of this Court in *May* v. *Hamburg Etc. Gesellschaft*, 290 U. S. 333 (1933), in requiring a causal relation between unseaworthiness and cargo damage as a condition of imposing liability for such damage on the carrier.

4. Whether the Carriage of Goods by Sea Act has changed the rule of *Schnell* v. *The Vallescura*, 293 U. S. 296 (1934), that the burden of segregating cargo damage by unseaworthiness from that caused by an excepted peril is upon the carrier.

Argument

The petition for writ of certiorari should be denied for the underlying reasons that (a) it complains not of standards of seaworthiness or of due diligence adopted by the court below but of the application of those standards to the facts proved, and (b) it raises only questions of fact on which both courts below concurred.

The petition itself states a sufficient reason for its denial. On page 5 it is alleged that *The Zarembo*, 44 F. Supp. 915 (E. D. N. Y. 1942), 136 F. 2d 320 (C. C. A. 2nd, 1943), presented "exactly the same issues" as are presented here. This Court denied certiorari in that case. *Balfour, Guthrie & Co., Ltd.* v. *The Zarembo*, 320 U. S. 804 (1944). If "exactly the same issues" were presented there as are presented here, certiorari should be here denied.

With respect to the damage to the cargo stowed in No. 1 hold the contentions of the petition on their face relate purely to findings of fact and involve no issue of law. Hence, the petition does not present issues appropriate for review by this Court irrespective of what view may be taken of the correctness of the decisions of these questions of fact by the courts below.

In so far as the court below affirmed findings of fact because "not so clearly erroneous that an appellate court would be justified in setting them aside", it followed and employed the language of the Federal Rules of Civil Procedure, 28 U. S. C. foll. §723 (c), Rule 52 (a) of which provides that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the

opportunity of the trial court to judge of the credibility of the witnesses". In so doing the court below was following, not extending, the rule concerning findings of fact; and its decision does not raise the question as claimed in the petition as to whether the trial court's findings must be supported "merely by evidence or whether they must be supported by the clear weight of the evidence".

The general principle now established in the language of Rule 52 (a) has been stated in countless decisions in varying language and such variation in language appears to be the basis for the allegation of the petition that the decisions of the Circuit Courts of Appeal for the First and Eighth Circuits, in *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1st, 1941), and *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. 2d 412 (C. C. A. 8th, 1940), are in conflict. An examination of these decisions shows that they are merely candidates for addition to the list of cases in the appendix to the opinion in *Petterson Lighterage & T. Corp.* v. *New York Central R. Co.*, 126 F. 2d 992 (C. C. A. 2nd, 1942), and that they do not raise any question of conflict among the circuits.

While the two questions relating to the effect of the Carriage of Goods by Sea Act, 49 Stat. 1207-1213, 46 U. S. C. §§1300-1315, have no application to the cargo owned by the respondents on whose behalf this brief is filed, they nevertheless affect these two respondents because the Circuit Court of Appeals entered one order of affirmance and the petition seeks to bring up the whole record.

The decision of the court below does not involve the effect of the Carriage of Goods by Sea Act, 49 Stat. 1207-1213, 46 U. S. C. §§1300-1315, upon the decision of this Court in *May* v. *Hamburg Etc. Gesellschaft*, 290 U. S. 333 (1933), because both courts below specifically found that the damage to the cargo stowed elsewhere than in No. 1 hold was caused by the unseaworthiness of the *Otho* resulting from want of due diligence (R. 1273; Findings of Fact Nos. 56, 71, 72, Conclusion of Law No. 8, R. 1217, 1220-1223). As both courts found causal relation, the present case manifestly does not raise the question of liability in the absence of such causal relation.

The contentions of the petition with respect to burden of proof are without substance for at least two reasons. First, under the findings of fact the ship's unseaworthiness caused the damage to the cargo and the petitioners have thus far failed to bring any of the damage within an expected cause. Secondly, numerous cases decided since the passage of the Carriage of Goods by Sea Act in 1936 have been decided in accordance with the rule of *Schnell* v. *The Vallescura*, 293 U. S. 296 (1934), without questioning the current authority of that decision or suggesting that its applicability has been affected by the statute. *Pioneer Import Corporation* v. *The Lafcomo*, 138 F. 2d 907 (C. C. A. 2nd, 1943), certiorari denied January 31, 1944; *Wessels* v. *The Asturias*, 126 F. 2d 999, 1001 (C. C. A. 2nd, 1942).

The petition presents no question of public importance or any other question requiring this Court to re-examine the evidence which has been thoroughly considered and

discussed in the opinions of the Circuit Court of Appeals and the District Court; and it should, therefore, be denied.

New York, April 14, 1944.

Respectfully submitted,

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